Supreme Court, U.S.
FILED

94 9 JUN 30 1994

OFFICE OF THE CLERK

No. 93-1893

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Cross-Petitioners,

v.

C. I. STROUD, J. M. SMITH, and ALFRED E. MORRIS, Individually,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CROSS PETITION FOR WRIT OF CERTIORARI

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June 30, 1994

Washington, D.C. • THIEL PRESS • (202) 328-3266

32 pp

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING, CONTRARY TO PRIOR DECISIONS OF THIS COURT, THAT THE QUESTION OF WHETHER A SUPERVISOR'S FAILURE TO INVESTIGATE SERIOUSLY A SERIES OF COMPLAINTS ABOUT A TROOPER'S USE OF EXCESSIVE FORCE CONSTITUTES MERE NEGLIGENCE OR DEMONSTRATES DELIBERATE INDIFFERENCE IS NOT A QUESTION FOR THE JURY TO DECIDE?

II. DID THE COURT OF APPEALS ERR IN HOLDING, CONTRARY TO PRIOR DECISIONS OF THE FOURTH CIRCUIT AND OTHER CIRCUITS, THAT AN OFFICIAL WHO KNEW OR SHOULD HAVE KNOWN THAT HE WAS COMMITTING A CONSTITUTIONAL VIOLATION IS ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY BY MERELY CLAIMING THAT HIS ACTIONS FOLLOWED THE "STANDARD OPERATING PROCEDURES" OF HIS AGENCY?

III. DID THE COURT OF APPEALS ERR BY REFUSING TO RECOGNIZE A FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS RIGHT OF FAMILY MEMBERS TO ENJOY THE LOVE AND SUPPORT OF THEIR HUSBAND AND FATHER WITHOUT UNJUSTIFIED GOVERNMENTAL INTRUSION, IN DIRECT CONFLICT WITH THE THIRD, SEVENTH, NINTH AND TENTH CIRCUITS WHICH HAVE EXPLICITLY RECOGNIZED SUCH A CONSTITUTIONAL RIGHT IN THESE CIRCUMSTANCES?

LIST OF PARTIES

Petitioner C. I. Stroud, a Sergeant in the North Carolina Highway Patrol.

Respondents and Cross-Petitioners Deborah Shaw, Administratrix of the Estate of Sidney Bowen, Deceased; and Nancy Bowen, individually and as guardian ad litem for Kimberly Yvonne Bowen and Lee Frederick Bowen, who are Sidney Brown's wife and two minor children.

Cross-Respondents J. A. Smith, a Sergeant in the North Carolina Highway Patrol and A. E. Morris, a trooper for the North Carolina Highway Patrol.

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DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, Deceased, and NANCY BOWEN, Individually and as Guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

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OPINION BELOW

The Fourth Circuit's opinion in this case is *Shaw v. Stroud,* 13 F.3d 791 (4th Cir. 1994), and is reproduced in the appendix to the Petition for Certiorari filed herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 6, 1994. The Court of Appeals denied a petition for rehearing on February 25, 1994. This Cross-Petition is filed pursuant to the provisions of Rule 12.3 of the Rules of the Supreme Court of the United States. The Petition for Writ of Certiorari was received by counsel for Respondent on May 31, 1994.[1] Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

2. 42 U.S.C. §1983 (set out in Petition for Writ of Certiorari at App. 73).

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[1]The Certificate of Service states that the petition was mailed on May 26, 1994. Counsel for Respondent did not receive it until the 31st because the intervening days included a weekend and the Memorial Day holiday.

STATEMENT OF THE CASE

This Cross-Petition seeks review of that portion of the lower court's opinion which affirmed the grant of summary judgment in favor of Sergeant J. M. Smith on the merits and affirmed the holding that Sergeant Smith is entitled to qualified immunity. Sergeant Smith was Trooper Morris' supervisor at the time of the incident at issue. Smith was made aware of Morris' violent tendencies on several occasions, once by a sitting county district court judge. A line sergeant reported to Smith that

> Judge Gore states that he is very concerned that Trp. Morris is having case after case involving the use of physical force on defendants. Judge Gore states that in his opinion a lot of these cases are a result of excessive force being applied. Judge Gore states that he is being informed from several lawyers that excessive force is being applied to their clients from Trp. Morris. Judge Gore went on to say that he feels that it is only a matter of time before Trp. Morris seriously injures a person and Trp. Morris and the H.P. [Highway Patrol] will be sued. Judge Gore stated that it seems that most of the cases he refers to involve blacks or people of lower means. Judge Gore stated he likes Trp. Morris but feels bound by his position to inform us of this problem. J.A. 447[2]. *Shaw v. Stroud*, 13 F.3d 791 at 805 (4th Cir. 1994).

In addition, reports were made to the same line sergeant that Morris had pulled over a citizen in South Carolina and forced him at gunpoint to return to North Carolina to be arrested. During a scuffle following the

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[2]J.A. refers to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

arrest, the arrestee suffered broken ribs and a broken foot. *Shaw,* 13 F.3d at 806. Finally, just three weeks before Morris shot Bowen, Morris met Smith at the hospital with an arrestee of his who was injured during his arrest for drunken driving. Smith, the dissent said, "had the power, responsibility, and opportunity to put a stop to Morris' conduct." *Shaw,* 13 F.3d 791. Summary judgment in his favor was improper because a reasonable jury could find that Smith was deliberately indifferent.

In addition, the individual plaintiffs, Nancy Bowen and her two children, [hereinafter "The Bowen Family"] seek review of the Fourth Circuit Court of Appeals decision in this case to go against the weight of precedent in other circuits in declining to recognize a cause of action for the violation of the Bowen Family's Fourteenth Amendment due process rights which occurred in these circumstances.

Of particular relevance to this Cross-Petition procedurally is the fact that after Stroud appealed the denial of his summary judgment motion on the qualified immunity defense, Deborah Shaw, Administratrix of the Estate of Sidney Bowen, [hereinafter referred to as "Bowen's Estate"], and the Bowen Family, filed a motion pursuant to 28 U.S.C. §1292(b) seeking certification of additional issues to be heard by the Court of Appeals. The district court granted this motion on September 4, 1992 (Appendix to Cross Petition) and the Court of Appeals issued an order permitting appeal of the interlocutory order on October 16, 1992. (Appendix to Cross Petition). Thus, the question of the district court's granting of qualified immunity and summary judgment on the merits to Sergeant Smith and the substantive due process claim were properly before the Court of Appeals. *See Shaw v.*

Stroud, 13 F.3d 791, 798 (4th Cir. 1994), Petition for Writ of Certiorari at App. 12, [hereinafter "Pet. App."]. Judge Hall, dissenting in part from the majority opinion below, would have reversed the grant of summary judgment for Smith. *Shaw,* 13 F.3d at 805; Pet. App. 26.

REASONS FOR GRANTING THE WRIT

This case should be remanded for trial, for all of the reasons detailed in Respondent's Brief in Opposition filed herein. However, if the Petition for Certiorari is granted, the Court should also grant this conditional cross petition so that it may review the entire judgment of the Court of Appeals as it relates to the application of principles of supervisory liability under 42 U.S.C. §1983 to the particular circumstances of this case. In addition, the Court of Appeals declined to recognize a Fourteenth Amendment due process right to family association, which directly conflicts with the majority of the other circuit courts which have recognized such a right.

If the Court grants the Petition to review Sergeant Stroud's supervisory liability, issues relating to the lower court's analysis of Sergeant Smith's supervisory liability should also be reviewed. The majority opinion below raises two issues relating to Sergeant Smith: (1) Whether a reasonable jury could conclude that Sergeant Smith was deliberately indifferent to a known risk of harm; and (2) Whether a supervisor who knew he was committing a constitutional violation is entitled to qualified immunity simply because he claims to have followed his agency's standard operating procedure.

I.

A FULL AND FAIR CONSIDERATION OF SUPERVISORY LIABILITY IN THIS CASE REQUIRES REVIEW OF THE LIABILITY OF BOTH OF TROOPER MORRIS' SUPERVISORS.

The central issue raised by the Petition for Certiorari is whether one or both of Trooper Morris' supervisors were deliberately indifferent to Morris' pattern of using excessive force and therefore responsible for the death of Sidney Bowen. Taken together, the majority opinion and the dissent below found Sidney Bowen's death was caused in part by the deliberate indifference of Trooper Morris' supervisors in the face of Morris' repeated pattern of using excessive force with arrestees, most of whom were "blacks or people of lower means." *Shaw v. Stroud,* 13 F.3d at 805-06. The string of thirteen prior incidents of Morris' use of excessive force began with a beating he administered in October, 1986, while Sergeant Stroud was his supervisor, and continued after Sergeant Smith took over in November, 1988, with the last known incident occurring just three weeks before Sidney Bowen was killed. Likewise, Morris' pattern of issuing disproportionate numbers of citations for resisting arrest and assault on an officer was apparent throughout the entire period. Both supervisors were made aware of various complaints about Morris' use of force and about the injuries that arrestees received while in his custody.

As the majority of the Fourth Circuit pointed out, when Stroud was notified of repeated assaults by Morris, Stroud "responded callously and with apparent amusement." *Shaw,* 13 F.3d at 800. Sergeant Stroud was clearly aware of Morris' violent propensities. Judge

Hall, dissenting from the majority opinion below, similarly pointed out Sergeant Smith's failings. Though Stroud did not provide any information to Smith about Morris' history, Smith had personal knowledge of several instances in which Morris used excessive force during his relatively short time as sergeant. *Shaw*, 13 F.3d at 805-06.

The majority below allowed the case to proceed against Stroud but not against Smith primarily because there was direct evidence of Sergeant Stroud's deliberate indifference while Sergeant Smith took some action to monitor the situation. 13 F.3d at 801. In contrast, the dissent argued that Stroud could not be liable because his transfer and the resulting 15 month gap between his supervision and Sidney Bowen's death breaks the causal link, but that the evidence was such that a reasonable jury could conclude that Smith was deliberately indifferent. 13 F.3d at 805-07.

In order for this Court appropriately to review the issue raised in Stroud's position, this cross-petition concerning Sergeant Smith's liability must also be granted. While Bowen's Estate maintains that both supervisors are liable, if the Court were to agree with the opinion of the dissenting Judge below, appropriate relief could not be granted unless the issues raised in this cross petition are also before the Court. Granting the petition in this case without granting the conditional cross petition would put Bowen's Estate in the position of being unable to proceed against Smith even if the Court decides that Smith, not Stroud, is the responsible supervisor. Similarly, if the Court were to agree with Bowen's Estate that, in light of the evidence as viewed most favorably to it, a reasonable jury could conclude that both Stroud and Smith were deliberately indifferent and that thereby they both are

responsible in part for Sidney Bowen's death, granting this cross petition is necessary to put the issue of Smith's liability before the Court and to give the Court the opportunity to remand the case with suitable directions to proceed on that basis. None of the total of four Judges who have reviewed the full record of evidence in this case has concluded that both of Morris' supervisors should avoid trial, yet that would be a potential result if this Court were to grant the petition without also granting the cross petition.

Indeed, the fact that consideration of Stroud's liability in this case is inextricably linked to questions concerning Smith's supervision of Morris is further demonstrated by Petitioner's second argument that the intervening supervision of Sergeant Smith insulates him from liability in this case. Stroud maintains that since Smith's supervision was constitutionally adequate it has a curative effect on Stroud's unconstitutional deliberate indifference and breaks the causal connection between his inaction and Sidney Bowen's death. Petition for Writ of Certiorari at 13-14. Bowen's Estate contends that Smith was deliberately indifferent, a fact that was reasonably foreseeable by Stroud, and therefore Smith's misconduct does not remove Stroud as a proximate cause of Bowen's death.

In the circumstances of this case, the issue presented in the petition directly raises questions concerning the liability of Sergeant Smith. If the petition is granted, this cross petition should also be granted to give the court the ability to consider fully the entire controversy concerning supervisory liability.

II.

THE COURT BELOW SHOULD HAVE ALLOWED A JURY TO DETERMINE WHETHER SERGEANT SMITH WAS DELIBERATELY INDIFFERENT INSTEAD OF DECIDING THIS FACTUAL ISSUE ITSELF.

The court below made a factual determination about Smith's behavior:

> Although Smith's actions may not have been the most effective and although he might have done more, such a rule is not the standard by which we judge Smith's conduct. In short, Smith simply did not exhibit the "tacit authorization" of or "deliberate indifference" to constitutional injuries required for §1983 supervisory liability. *Shaw,* 13 F.3d 791.

If the Court grants the petition to review Stroud's liability for his deliberate indifference, the Court should also review the Fourth Circuit's error in concluding that Smith is entitled to summary judgment on the merits of the Fourth Amendment claim. The issue of deliberate indifference is a question for the jury. See *City of Canton v. Harris,* 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Here, contrary to the teaching of *Canton,* the court below made its own finding of fact rather than allowing the jury to determine whether Smith exhibited the level of tacit authorization necessary for supervisory liability. 13 F.3d at 801; Pet. App. 17-18.

The task of the reviewing court on a motion for summary judgment is to take one step back and ask whether there is a genuine issue for trial, rather than come to its own conclusion about the weight and sufficiency of the evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 149, 106 S.Ct. 2505, 91 L.Ed.2d

202 (1986). The evidence of the non-moving party is to be believed and all justifiable inferences from that evidence are to be drawn in their favor. *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). As this Court reiterated in a more recent decision:

> Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. ___ , 119 L.Ed.2d 265, 112 S.Ct. 2072 (1992). The reasonableness of inferences from the evidence in this case favorable to Bowen's Estate is demonstrated by Judge Hall's discussion of the facts concerning Smith's supervision in his dissenting opinion in the court below. *See Shaw,* 13 F.3d at 805-06; Pet. App. 26-28.

Whether a supervisor acts with deliberate indifference towards a known risk of harm is a question of intent which does not need to be proven by direct evidence. *See Bostic v. Wall,* 588 F.Supp. 994 (D.C.N.C. 1984). Bowen's Estate's evidence in this case demonstrates directly that Smith did have knowledge of allegations that Trooper Morris was using excessive force on numerous occasions. Reliable and responsible parties told Sergeant Smith about serious problems with Morris' use of force on arrestees, including a state court Judge and a local attorney.

Smith did not request an internal affairs investigation, as is required by the standard operating procedures of the North Carolina Highway Patrol, when he was told that one of his Troopers may be violating the law. Smith did not make any attempt to find out when and where these

violations might have taken place and who the victims were. Smith did not interview any of the persons injured during the course of their arrest by Trooper Morris. Smith did not look at any hospital records. In fact, three weeks before Sidney Bowen was killed, Smith learned that a Morris arrestee had allegedly fractured his skull on the vent shade of a patrol car and Smith apparently found nothing unusual or surprising about that, since no investigation of the incident is initiated.

Throughout the period from December, 1988, until Sidney Bowen was killed on February 27, 1990, Smith's only action in response to all of the information demonstrably available to him concerning Trooper Morris' behavior was to ride with Morris in the patrol car twice, send a sergeant to hear the evidence relating to criminal charges in one case where an arrestee was injured, and discuss the complaints by the local judge and attorney with his commander. As Judge Hall commented: "[f]rom these series of facts, a jury could reasonably find that Smith's inertia was deliberate." *Shaw*, 13 F.3d at 806, Pet. App. 28. Smith's response makes about as much sense as a police officer responding to information that Joe Jones had committed a string of bank robberies by riding around with Jones on two occasions to see if he does it again. The fact that the panel below did not agree on the inferences to be drawn from plaintiff's evidence is certainly an indication that the evidence creates a genuine issue for trial. The majority erred in substituting its own deliberations for those of the jury yet to be empaneled in this case and this Court should correct that error.

III.

WHERE A GOVERNMENT OFFICIAL KNOWS OR SHOULD KNOW THAT HE IS COMMITTING A CONSTITUTIONAL VIOLATION, HE IS NOT ENTITLED TO QUALIFIED IMMUNITY SIMPLY BECAUSE HE FOLLOWED STANDARD OPERATING PROCEDURES.

The court below held that even if Sergeant Smith was deliberately indifferent to a known risk of harm because he knew about Trooper Morris' repeated use of excessive force when faced with suspects or arrestees who demonstrated verbal or physical resistance to his authority, and did nothing more than what the dissent characterized as an "ostrich-like" investigation, he is still entitled to qualified immunity from suit. *Shaw,* 13 F.3d at 802-03, 806, Pet. App. 21. The court found that during the relevant time period, the law was clearly established, both in terms of what degree of force amounted to unconstitutional excessive force and in terms of what action or inaction would result in supervisory liability. *Id.* at 801. However, Smith was granted qualified immunity because a reasonable officer could have believed that by following standard operating procedures he was acting lawfully. *Id.* at 803.

The reality is that Smith failed to follow standard operating procedures, while claiming to follow it. The policy of the North Carolina Highway Patrol requires that an internal affairs investigation be initiated any time information comes to the attention of any member of the patrol that another member is violating any rules and regulations, but Smith had such information and did not initiate an internal affairs investigation.

In any case, the court below compounded the factual error of concluding that Smith had followed standard procedures when he did not, by applying a fallacious rule

of law. Simply following agency or departmental policy in any particular circumstance does not guarantee an official qualified immunity. The policy itself may be unconstitutional on its face, *see e.g., Weber v. Dell,* 804 F.2d 796, 802 (2nd Cir. 1986), or it may be that the agency's failure to have an adequate policy leads to the constitutional violation. *See e.g., City of Canton v. Harris,* 489 U.S. 378, 390-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Spell v. McDaniel,* 824 F.2d 1380, 1387-91 (4th Cir. 1987). In either circumstance, the individual officer may indeed be following standard operating procedures yet violating citizens' constitutional rights. Courts have repeatedly held individual officers liable even when their city was also held liable for maintaining unconstitutional policies. For example, in *Fields v. City of South Houston,* 922 F.2d 1183 (5th Cir. 1991), the Fifth Circuit held that a police officer was not entitled to qualified immunity despite the fact that he was following a city policy when he held a suspected drunk in custody without providing medical attention. See also: *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981) (individual officer found liable for use of excessive force; chief and city also liable for policy of encouraging use of excessive force); *Clipper v. Takoma Park, Md.,* 876 F.2d 17 (4th Cir. 1989); (individual officer held liable for making arrest without probable cause; city also liable for policy of allowing same); *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), *cert. denied,* 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987) (officers liable for excessive force in wrongful death; city also liable for inadequate training); *Jackson v. Elrod,* 881 F.2d 441 (7th Cir. 1989) (individuals not entitled to qualified immunity for following policy of banning all hard-

back books from inmates even where it was prison standard operating procedure).

By focusing on whether Smith was following standard operating procedures, the court below answered the wrong question and applied the wrong legal standard. The appropriate inquiry on a motion for qualified immunity is well-established. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton,* 438 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The question is whether in light of all of the circumstances, Smith reasonably could have believed that his actions were constitutional. Given the justified inference from the evidence that Smith was, in fact, deliberately indifferent, a reasonable officer could not have believed that by turning a blind eye to Morris' abuses he was acting constitutionally. As the dissent noted: "Judge Gore's warning had to be perceived as extraordinary, and should have set off a serious investigation." *Shaw,* 13 F.3d at 806. A reasonable supervisor could not have believed that Smith's deliberately ineffective response to this complaint was lawful. This Court should review this case so that it can apply the correct standard and deny Smith the shield of qualified immunity in this case.

IV.

THE FOURTH CIRCUIT, CONTRARY TO THE LAW IN ALMOST EVERY OTHER CIRCUIT, ERRED IN REFUSING TO RECOGNIZE THE BOWEN FAMILY'S SUBSTANTIVE DUE PROCESS RIGHTS IN THESE CIRCUMSTANCES.

The Fourth Circuit, in its opinion in this case, declined to recognize a substantive due process claim under §1983 for family members of an injured party based on the constitutional liberty interest of intimate association. *Shaw,* 13 F.3d 791. See also, *Rucker v. Harford County, Md.,* 946 F.2d 278, 282 (4th Cir. 1991), *cert. denied,* 112 S.Ct. 1175 (1992). The majority of circuits which have addressed this issue have recognized such due process rights and constitutional claims under §1983. *See Estate of Bailey by Oare v. York County,* 768 F.2d 503 (3rd Cir. 1985); *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984); *Smith v. City of Fontana,* 818 F.2d 1411 (9th Cir. 1987), *cert. denied,* 108 S.Ct. 311, 484 U.S. 935, 98 L.Ed.2d 269 (1987); *Trujillo v. Bd. of Cty. Com'rs of Cty. of Santa Fe,* 768 F.2d 1186 (10th Cir. 1985). Two circuits, along with the Fourth Circuit, have declined to recognize such claims. *See Valdivieso Ortiz v. Burgos,* 807 F.2d 6 (1st Cir. 1986); *Harpole v. Arkansas Department of Human Services,* 820 F.2d 923 (8th Cir. 1987). The Fifth and Sixth Circuits have specifically declined to address the issue, holding that state wrongful death statutes provided the necessary relief. *Rhyne v. Henderson Cty.,* 973 F.2d 386 (5th Cir. 1992); *Purnell v. Campbell,* 925 F.2d 941 (6th Cir. 1991). There is a clear conflict among the circuits as to whether claims for constitutional violations of familial associations can be brought under §1983. This conflict has caused confusion and disagreement among the lower courts. "The right to such recovery under

§1983 has 'generated considerable confusion and disagreement', over which the circuits have divided." *Rhyne* at 390.

The Court should consider this issue so that federal law will be uniform throughout the circuits. In addition, the claim is well supported by the legislative history of §1983's precursor,[3] and by long-standing Supreme Court decisions concerning the importance of maintaining family integrity free of interference by the state. The legislative history of the Ku Klux Klan Act of 1871 attests to the fact that it was meant to create a remedy for the destruction of family relationships by illegal, racially-motivated violence. One of the Act's proponents stated:

> This then is what we offer to the people of the United States as a remedy for wrongs, arsons and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.

Cong. Globe, 42nd Cong., 1st Sess. 806 (Representative Butler). Rather than being an extension of the law, this type of claim was intended by those who enacted the means for a remedy under §1983.

The rights of Sidney Bowen's wife and children to recover under §1983 for the unlawful breach of the fam-

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[3] 42 U.S.C. §1983 was derived from section 1 of the Civil Rights Act of 1871 (also referred to as the Ku Klux Klan Act of 1871). Congress enacted §1983 pursuant to its power under §5 of the Fourteenth Amendment to make appropriate laws to enforce that amendment. *Quern v. Jordan*, 440 U.S. 332, 351 n.3, 355, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Brennan, J., concurring).

ily relationship is further supported by the Supreme Court decisions recognizing that there is a "private realm of family life which the state cannot enter." *Moore v. East Cleveland,* 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (*quoting Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)); *Wisconsin v. Yoder,* 406 U.S. 205, 232-33, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Just as state officials are liable for damages for taking children away from their parents without due process, *see, e.g., Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977) (mother has cognizable claim under §1983 for seizure of her children without hearing or court order), state officials, acting under color of law similarly should be held liable for permanently taking a husband away from his wife and a father away from his children.

Congress intended to allow survivors to sue under §1983 for the harm suffered from the murders of their loved ones. Nancy, Kimberly and Frederick Bowen claim that Morris' actions constituted unwarranted state interference with their rights to familial companionship and society. This Court should recognize this constitutional right in these circumstances, resolve the conflict among the circuits, and reverse the lower court's grant of summary judgment to Defendant Morris on this claim.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the Petition For Writ Of Certiorari in No. 93-1893, then it should also grant this conditional cross petition for a writ of certiorari.

Respectfully submitted,

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June 30, 1994

CERTIFICATE OF SERVICE

I, James E. Ferguson, II, do swear or declare that on this date, the 30th day of June, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Respondents' Brief In Opposition on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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This the 30th day of June, 1994.

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APPENDIX A

[Filed SEP 04 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 91-18-CIV-7-BR

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, deceased, and NANCY BOWEN, individually and as guardian ad litem for KIMBERLY YVONNE BOWEN and LEE FREDERICK BOWEN, the minor children of Sidney Bowen,

Plaintiffs,

v.

ALFRED E. MORRIS; C.I. STROUD, and J.M. SMITH, in their individual capacities,

Defendants.

ORDER

This action was instituted seeking compensatory and punitive damages arising out of the death of Sidney Bowen. Named as defendants were Alfred E. Morris, a North Carolina state trooper who shot Sidney Bowen, and C.I. Stroud and J.M. Smith, who served as supervisors over Morris. In an order dated 5 August 1992 the

court ruled on motions for summary judgment and other motions which were pending at that time.

As a result of rulings made by the court in that order, the action was dismissed as to defendant J.M. Smith. And, although some claims against defendants Morris and Stroud were dismissed, others were left for disposition. In particular, the court denied the qualified immunity defense asserted by defendant Stroud in his motion for summary judgment. As he was entitled to do, defendant Stroud gave notice of appeal from that decision to the United States Court of Appeals for the Fourth Circuit. The case is currently set for trial on 24 September 1992.

Now pending before the court are the following motions:

1. By defendant Morris to sever.

2. By plaintiffs seeking certification under 28 U.S.C. §1292(b) of additional issues to be heard by the Court of Appeals or, in the alternative, for final judgment on dismissed claims under Rule 54(b) of the Federal Rules of Civil Procedure.

Upon full considerationof the arguments presented, the motion of defendant Morris is denied and the motion of plaintiffs is allowed.

The court notes that by order dated 27 August 1992, upon motion of defendant Stroud, it certified the 5 August 1992 order, as it pertains to defendant Stroud, in its entirety.

The court now certifies that the following matters covered by its order involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of this litigation:

A. The grant of summary judgment for defendant Smith on the grounds of qualified immunity with respect to plaintiffs' 42 U.S.C. §1983 claim under the Fourth Amendment;

B. The grant of summary judgment on plaintiffs' negligent infliction of emotional distress claim; and,

C. The grant of summary judgment on plaintiffs' 42 U.S.C. §1983 claim asserting substantive due process rights.

The trial is hereby continued until further order of the court.

This 3 September 1992.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX B

[Filed October 16, 1992]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-8075
CA-91-18-7-BR

DEBORAH SHAW, Administratrix of the Estate of Sidney Bowen, deceased; NANCY BOWEN, Individually, and as guardian ad litem for Kimberly Yvonne Bowen and Lee Frederick Bowen, the minor children of Sidney Bowen

Petitioners,

v.

ALFRED E. MORRIS; C. I. STROUD, Individually; J. M. SMITH

Respondents

ORDER

Petitioners have filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b). Respondent Alfred E. Morris has filed a motion for leave to file his answer to petition out of time.

The Court grants the petition for permission to appeal. The Court also grants respondent's motion for leave to file his answer out of time.

Entered at the direction of Judge Hall, with the concurrence of Judge Ervin and Judge Murnaghan.

FOR THE COURT

/s/ Bert M. Montague
CLERK